No. 23-367

In the Supreme Court of the United States

STARBUCKS CORPORATION, PETITIONER

v.

M. KATHLEEN MCKINNEY, REGIONAL DIRECTOR OF REGION 15 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard for granting interim injunctive relief under 29 U.S.C. 160(j).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 77 F.4th 391. The opinion of the district court (Pet. App. 67a-121a) is not published in the Federal Supplement but is available at 2022 WL 5434206.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2023. The petition for a writ of certiorari was filed on October 3, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, prohibits employers and un-

ions from engaging in various unfair labor practices. 29 U.S.C. 158. The National Labor Relations Board (NLRB or Board) enforces that prohibition. 29 U.S.C. 160(a).

If a person believes that an employer or union has committed an unfair labor practice, the person may file a charge with the agency. 29 C.F.R. 101.2. A regional director, exercising authority delegated by the General Counsel, investigates the charge. 29 C.F.R. 101.5, 101.6. If "the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful," the regional director issues a complaint. 29 C.F.R. 101.8; see 29 U.S.C. 153(d), 160(b).

An administrative law judge (ALJ) then holds a hearing and issues a recommended decision, which the Board may review. 29 C.F.R. 101.10-101.12. If the Board finds that a party has engaged in an unfair labor practice it "shall" order the party to "cease and desist" from the violation and to take such affirmative action, including "reinstatement of employees," as will effectuate the policies of the Act. 29 U.S.C. 160(c). The Board's decision is subject to review in a court of appeals. 29 U.S.C. 160(e) and (f).

Because an employer's or union's conduct may cause harm while that administrative process is pending, Congress has empowered the Board, after the issuance of a complaint, to petition a federal district court "for appropriate temporary relief." 29 U.S.C. 160(j). The court may "grant to the Board such temporary relief or restraining order as it deems just and proper." *Ibid.*

Under longstanding agency practice, when an NLRB regional director concludes that an unfair-labor-practice case has merit and that temporary relief would be appropriate, the regional director will submit a writ-

ten memorandum to the General Counsel recommending the initiation of Section 10(j) proceedings. See Office of the Gen. Counsel, NLRB, *Section 10(j) Manual* § 5.2, at 15 (Mar. 2020). If, upon review, the General Counsel agrees that such proceedings should be initiated, the General Counsel will present the recommendation to the Board. *Ibid.* If the Board then authorizes the proceeding, the regional director will file a petition in district court. *Id.* § 5.5, at 17.

2. Petitioner Starbucks Corp. operates a chain of coffeehouses. Pet. App. 71a. In 2021, employees at a Starbucks store in Memphis, Tennessee, began a union-organizing drive. *Id.* at 72a-73a. In response, petitioner allegedly used various unlawful tactics to stifle the drive, culminating in the firing of seven union activists (the Memphis Seven). *Id.* at 5a-7a.

The union filed unfair-labor-practice charges with the Board. Pet. App. 7a. Specifically, it alleged that petitioner had unlawfully interfered with its employees' right to form a union, see 29 U.S.C. 158(a)(1), and had unlawfully discriminated against union members, see 29 U.S.C. 158(a)(3). Pet. App. 7a. After investigating the charges, the regional director (respondent here) issued an unfair-labor-practice complaint. *Id.* at 7a-8a.

3. While the agency proceedings were pending, the regional director filed a petition for temporary relief on behalf of the Board in the United States District Court for the Western District of Tennessee. Pet. App. 50a. In accordance with Section 10(j) of the Act, the agency sought temporary relief pending the resolution of the unfair-labor-practice proceedings before the Board. *Id.* at 8a.

The district court granted, in part, the agency's petition for temporary injunctive relief. Pet. App. 67a-

121a. The court explained that, under the Sixth Circuit's precedent, a court may grant temporary relief under Section 10(j) only if (1) there is "'reasonable cause' to believe that an unfair labor practice has occurred" and (2) "injunctive relief is 'just and proper.'" *Id.* at 88a (citation omitted).

The district court first found reasonable cause to believe that petitioner had committed unfair labor practices. Pet. App. 89a-108a. The court observed that the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [by the Act]" or to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization." *Id.* at 90a (quoting 29 U.S.C. 158(a)(1) and (3)). The court found sufficient evidence to support the agency's claims that petitioner had interfered with its employees' union activity and had discriminated against employees to discourage union membership. *Id.* at 91a-108a.

The district court then determined that a temporary injunction was just and proper. Pet. App. 108a-119a. The court explained that petitioner's conduct—which included firing more than 80% of the union organizing committee at the Memphis store—had discouraged and eroded support for a nascent unionization movement. *Id.* at 110a-111a. For example, as a result of petitioner's actions, employees had stopped publicly supporting the union, wearing union pins, engaging in union protests, and discussing union activity in the Memphis store, and the lone remaining union activist at the store was too fearful to recruit other employees to support the union. *Id.* at 111a-116a.

The district court accordingly awarded the agency "some, but not all," of the relief sought. Pet. App. 109a. The court issued a temporary injunction that, among other things, enjoined petitioner from discriminating against employees because of union activity and required the interim reinstatement of the Memphis Seven. *Id.* at 119a-121a. The district court and the court of appeals denied petitioner's motions for a stay pending appeal. *Id.* at 40a-48a, 49a-66a.

4. The court of appeals affirmed. Pet. App. 1a-39a.

The court of appeals, like the district court, observed that, under its precedent, the Board may obtain temporary relief under Section 10(j) only if it can show that "(1) there is 'reasonable cause to believe that unfair labor practices have occurred' and (2) injunctive relief is 'just and proper.'" Pet. App. 10a (citation omitted). Petitioner did not contest the district court's reasonable-cause finding, *id.* at 11a, and the court of appeals determined that the district court did not abuse its discretion in finding injunctive relief just and proper, *id.* at 11a-15a. In particular, the court of appeals upheld the district court's finding that petitioner's mass firing of union activists harmed the union campaign in ways that a subsequent Board remedy could not repair. *Id.* at 12a. The court of appeals highlighted "actual evidence of chill," including evidence that employees had stopped wearing union pins and discussing union activity after the discharges. *Ibid.* The court found "sufficient evidence" that "temporary relief [wa]s necessary to preserve the status quo pending resolution of the Board's proceedings." *Id.* at 15a.

Judge Readler issued a concurring opinion. Pet. App. 18a-39a. He criticized the circuit precedent that had established a two-part test for evaluating requests

for temporary injunctive relief under Section 10(j). *Id.* at 19a. He argued that courts should instead use the "familiar" test for injunctive relief that they apply in other legal contexts. *Id.* at 18a.

ARGUMENT

Petitioner argues (Pet. 14-32) that the court of appeals erred in applying a two-part test for assessing whether relief should be granted under Section 10(j) of the NLRA, rather than using the general four-factor test for issuance of an ordinary preliminary injunction. The court's decision does not conflict with any decision of this Court. And although different courts of appeals use different verbal formulations to describe the standard for granting Section 10(j) relief, those terminological distinctions do not warrant this Court's review. This Court has previously denied a petition for a writ of certiorari presenting the same question, see *HealthBridge Mgmt., LLC* v. *Kreisberg*, 574 U.S. 1066 (2014) (No. 14-93), and it should do likewise here.

1. Section 10(j) of the NLRA empowers a district court "to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j). In considering whether to grant the Board's petition for temporary relief, a court should consider the same general factors that are normally relevant to the granting of interim equitable relief: the merits and the equities.

In applying those factors, a court should account for the unique statutory context in which Section 10(j) petitions arise. In the NLRA, Congress entrusted the Board, not the courts, with "the authority to develop and apply fundamental national labor policy" and with "the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events

which might be charged as violative of its terms.'" *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978) (citation omitted). Before a district court receives a petition for temporary relief under Section 10(j), moreover, the case has already received significant consideration at the agency. A regional director has already investigated the case; the regional director and General Counsel have determined that a complaint should issue; and the regional director, General Counsel, and Board have further determined that an injunction is necessary to protect the Board's remedial authority. See *Chester* v. *Grane Healthcare Co.*, 666 F.3d 87, 96 n.8 (3d Cir. 2011). Moreover, unlike courts evaluating requests for ordinary preliminary injunctions, a district court in the Section 160(j) context will not ultimately resolve the underlying dispute (which instead falls within the Board's adjudicatory authority). See *id.* at 96. A court should therefore assess the merits and the equities in a manner that accounts for the deference owed to the Board's expert judgments, the significant pre-filing consideration that the case has already received at the agency, and the Board's ultimate authority to resolve the unfair-labor-practice claim and determine what relief is appropriate if it finds a violation.

2. Although the courts of appeals have adhered, in substance, to those general principles, different courts have articulated the test governing a court's review of Section 10(j) petitions in somewhat different terms. Some courts, including the court below, use a formulation that asks whether "(1) there is 'reasonable cause to believe that unfair labor practices have occurred' and (2) injunctive relief is 'just and proper.'" Pet. App. 10a (citation omitted); see, *e.g.*, *Chester*, 666 F.3d at 91-94 (3d Cir.); *Kinard* v. *Dish Network Corp.*, 890 F.3d 608,

612 (5th Cir. 2018); *Sharp* v. *Webco Indus., Inc.*, 225 F.3d 1130, 1133-1134 (10th Cir. 2000); *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 369 (11th Cir. 1992). Other courts use a four-part test, asking whether the Board has a likelihood of success on the merits, whether it faces irreparable harm, whether the balance of hardships tips in the agency's favor, and whether an injunction is in the public interest. See, *e.g.*, *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009); *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001); *McKinney* v. *Southern Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015); *Hooks* v. *Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022). And some courts blend both formulations, determining whether injunctive relief is "just and proper" by considering the elements of the four-part test. See, *e.g.*, *Pye* v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994); *Kreisberg* v. *HealthBridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013), cert. denied, 574 U.S. 1066 (2014).

Those distinctions, however, are essentially terminological rather than substantive. The "reasonable cause" prong of the two-part test parallels the "likelihood of success on the merits" prong of the four-part test. See *Chester*, 666 F.3d at 99 ("The reasonable cause prong has substantial overlap with the likelihood-of-success inquiry."); *Muffley*, 570 F.3d at 543 ("[U]nder the traditional four-factor standard, the court must still determine the Board's likelihood of success on the merits, an inquiry that essentially parallels the 'reasonable cause' step."). The courts that apply the two-part test thus evaluate the merits in essentially the same way as the courts that apply the four-part test. Compare, *e.g.*, *Chester*, 666 F.3d at 98 (explaining that the reasonable-

cause prong of the two-part test requires a "substantial" legal theory and "sufficient evidence to support that theory") (citation omitted), with, *e.g.*, *Frankl* v. *HTH Corp.*, 650 F.3d 1334, 1356 (9th Cir. 2011) (explaining that the Board "can make a threshold showing of likelihood of success" under the four-part test "by producing some evidence to support the unfair labor practice charge, together with an arguable legal theory") (citation omitted), cert. denied, 566 U.S. 904 (2012).

Similarly, the "just and proper" prong of the two-part test "necessarily subsumes various equitable considerations." *Sharp*, 225 F.3d at 1137 n.3. In particular, deciding whether temporary relief is just and proper entails deciding whether such relief is needed to prevent harm that the Board would be unable to remedy at the end of agency proceedings, see *Ahearn* v. *Jackson Hosp. Corp.*, 351 F.3d 226, 239 (6th Cir. 2003); "balancing" the parties' "relative harms," *Kobell* v. *United Paperworkers Int'l Union*, 965 F.2d 1401, 1409 (6th Cir. 1992); and determining whether "judicial action is in the public interest," *Sheeran* v. *American Commercial Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982). The four-part test incorporates the same equitable factors. See *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Such verbal distinctions are not unique to labor law. Even in the context of ordinary preliminary injunctions, "courts use a bewildering variety of formulations." 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.3 (3d ed. 2023) (Wright & Miller). Many courts, for example, refer to a "reasonable probability of success" rather than a "likelihood of success." *Ibid.*; cf. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (explaining that a party seeking interim equita-

ble relief pending certiorari must establish a "reasonable probability" that this Court will grant review and a "fair prospect" that the Court will reverse). "But the verbal differences do not seem to reflect substantive disagreement." Wright & Miller § 2948.3.

Petitioner errs in arguing (Pet. 25-26) that the four-part formulation imposes a more demanding standard than the two-part formulation. The courts applying the two-part test recognize that a Section 10(j) injunction is an "extraordinary remedy" to be invoked by the Board only in limited circumstances. *Kreisberg*, 732 F.3d at 141 (citation omitted); see, *e.g.*, *Arlook*, 952 F.2d at 374 ("In clarifying the standards governing § 10(j) * * * we do not stray from the principle, followed by * * * every circuit court * * * , that injunctive relief pursuant to § 10(j) is an extraordinary remedy, to be requested by the Board and granted by a district court only under very limited circumstances."). Conversely, the courts using the four-part formulation recognize the need to apply that test in a manner that accounts for the unique statutory context in which Section 10(j) petitions arise. See, *e.g.*, *Frankl*, 650 F.3d at 1356 ("[I]n evaluating the likelihood of success, 'it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations.'"); *Sharp* v. *Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (requiring "careful application of traditional equitable principles to the context of a § 10(j) preliminary injunction.").

3. Petitioner overstates (Pet. 22-25) the frequency with which the Board seeks Section 10(j) injunctions. The agency's publicly available statistics show that, in 2022, the agency received 17,998 unfair-labor-practice charges, and the General Counsel issued 738 unfair-

labor-practice complaints. See NLRB, *Unfair Labor Practice Charges Filed Each Year* (2023). The Board, however, authorized the filing of only 21 Section 10(j) petitions. NLRB, *Injunction Activity under Section 10(j)* (2023) (*Injunction Activity*). As those figures show, the agency seeks Section 10(j) relief only in a small fraction of the unfair-labor-practice disputes that come before it.

Petitioner also errs in asserting that "the NLRB's '§ 10(j) activity is on the rise.'" Pet. 5 (citation omitted). In reality, the agency's Section 10(j) litigation has *fallen* over the last decade. See *Injunction Activity*. For example, the Board authorized the filing of 38 Section 10(j) petitions in 2014 and 36 petitions in 2015, but only 21 petitions in 2022 and only 14 petitions so far in 2023. See *ibid.*

4. This case would, in all events, be a poor vehicle for resolving the question presented, because petitioner has not shown that the court of appeals would have reached a different outcome by applying a four-part test rather than a two-part test. Indeed, petitioner did not contest the district court's consideration of the merits in the court of appeals. See Pet. App. 11a ("Starbucks does not challenge the district court's holding that there is reasonable cause to believe that Starbucks violated the Act."). This case therefore would not be an appropriate vehicle for the Court to consider petitioner's arguments concerning the "reasonable cause" formulation and its application. Moreover, the complaint issued by the regional director and the petition to the district court for temporary relief approved by the General Counsel and the Board were not based on an esoteric legal theory. They charge core unfair labor practice violations of unlawful interference with employees' con-

certed activities in forming a union and of discrimination against union members. See, *e.g.*, *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 795-796 (1945).

The district court also considered each of the equitable factors that would be relevant under the four-part standard for injunctive relief. Thus, the court recounted harms that would occur in the absence of temporary relief and that could not be remedied at the end of the administrative process, see Pet. App. 110a-117a; found that "[a]ny hardship that may be caused" by granting temporary relief was "outweighed by the harm" that would be caused by the denial of such relief, *id.* at 117a (brackets and citation omitted); and determined that temporary relief was "in the public interest," *id.* at 118a (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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